

**IN THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF OKLAHOMA**

|                                   |   |                              |
|-----------------------------------|---|------------------------------|
| <b>STATE OF OKLAHOMA,</b>         | ) |                              |
|                                   | ) |                              |
| <b>Plaintiff,</b>                 | ) |                              |
|                                   | ) |                              |
| <b>v.</b>                         | ) | <b>No. 05-CV-329-GKF-SAJ</b> |
|                                   | ) |                              |
| <b>TYSON FOODS, INC., et al.,</b> | ) |                              |
|                                   | ) |                              |
| <b>Defendants.</b>                | ) |                              |

**STATE OF OKLAHOMA'S MOTION FOR EXTENSION OF TIME  
TO COMPLY WITH CERTAIN REQUIREMENTS OF  
THE AMENDED SCHEDULING ORDER [DKT #1376]**

Comes now the Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, ("the State"), and respectfully moves the Court to extend certain expert disclosure dates in the Amended Scheduling Order as indicated herein.

**I. Introduction**

On November 15, 2007, the Court entered its Amended Scheduling Order [DKT #1376], granting in part and denying in part proposals of both the State and the Defendants. The previous day, the State had filed its Motion for Preliminary Injunction [DKT #1373]. Since that time, Defendants have successfully asked the Court to postpone certain matters in consideration of the pendency of the preliminary injunction motion. As predicted by the State, these delays have prejudiced the State's ability to complete certain of its expert reports, currently due on April 1, 2008, and caused the State to have to ask the Court for an extension of certain expert disclosure deadlines in the Amended Scheduling Order. Furthermore, the exact content of the State's first expert reports is still at issue. And yet further, the State's own experts have

themselves been diverted from their other tasks to participate in the proceedings surrounding the State's Motion for Preliminary Injunction. For the reasons set forth herein, the State asks the Court to extend the due date for its initial expert reports from April 1, 2008, to August 1, 2008, and to defer Defendants' initial expert reports from July 1, 2008, until November 3, 2008.

The State has conferred with defense counsel and advises the Court that Defendants do not agree to this motion.

## **II. Legal Standard**

Fed. R. Civ. P. 16(b) states that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." "The 'good cause' standard primarily considers the diligence of the party seeking the amendment. The party seeking an extension must show that despite due diligence it could not have reasonably met the scheduled deadlines." *Deghand v. Wal-Mart Stores, Inc.*, 904 F. Supp. 1218, 1221 (D. Kan. 1995) (citations and quotations omitted); *see also Colorado Visionary Academy v. Medtronic, Inc.*, 194 F.R.D. 684, 687 (D. Colo. 2000) ("Properly construed, 'good cause' means that scheduling deadlines cannot be met despite a party's diligent efforts. In other words, this court may 'modify the schedule on a showing of good cause if [the deadline] cannot be met despite the diligence of the party seeking the extension'" (citation omitted)).

## **III. Argument**

There can be no dispute whatsoever that the State has been extraordinarily diligent in preparing its case for trial. Despite its diligent efforts, however, for the reasons that follow, the State is encountering difficulties in meeting the scheduled deadline for making certain of its expert disclosures on April 1, 2008.

**A. Defendants have delayed discovery necessary for the State's expert reports**

By its order [DKT #1336] the Court on October 24, 2007, the Court granted the State's Motion to Compel Cargill Inc. and Cargill Turkey Production LLC to produce 30(b)(6) designees fully knowledgeable on the subjects of its notice, denying that motion to the extent it sought discovery of matters more than five years previously. As of January 2008, the Cargill defendants had not tendered such 30(b)(6) witnesses, and so the State filed its Motion for Sanctions [DKT #1469] to secure proper testimony to prepare for both its preliminary injunction and its expert reports due April 1, 2008. The Cargill Defendants resisted this motion, and by order of February 1, 2008 [DKT #1502] the Court denied the State's motion for sanctions and granted motions on behalf of the Cargill Defendants to enforce compliance with a minute order of January 16, 2008, quashed the State's 30(b)(6) deposition notice and granted the Cargill Defendants' motion for protective order. Consequently, at the present time the Cargill Defendants have still not tendered their 30(b)(6) designees.

Additionally, on December 21, 2007 [DKT #1418] the State moved to expand the discovery period in this case by lifting the five year temporal limit imposed by the Court in its Order of July 6, 2007 [DKT #1207]. On January 7, 2008, Defendants moved to extend the time to respond to the State's motion [DKT #1438], agreeing that the five year temporal issue was important and needed to be considered, but claiming that, in light of the pending preliminary injunction motion, they should be allowed until after the preliminary injunction hearing to respond. By its order of February 1, 2008 [DKT #1502] the Court granted Defendants until March 10, 2008, within which to file responsive briefs, and granted the State until March 24, 2008, within which to reply. The Court additionally allowed the parties, by separate motion, to seek oral argument and/or an evidentiary hearing and to advise the Court whether this issue

needs to be resolved before resumption of Rule 30(B)(6) depositions. Order, p. 2. Consequently, as a practical matter, the State cannot will not receive any of its requested discovery beyond the five year temporal limit in advance of the current expert report due date of April 1, 2008.

Finally, it should not be overlooked that the production by Defendants of responsive materials to the State's discovery is still continuing. By way of example, it was not until this past January that Defendants even produced their bird numbers to the State -- information that the State first requested from Defendants in April 2006. Likewise, the State still needs to redo 30(b)(6) depositions of certain Defendants (the need for such redepositions occasioned by Defendants failure to adequately prepare their designees and obstructionist tactics at the depositions).

Simply put, Defendants' delays in complying with their discovery obligations, discovery which the State's experts need for their reports, has prejudiced the State.

**B. The State's appeal to the District Court of the Magistrate Judge's ruling regarding expert reports on "damages" or "remediation and affirmative relief" is pending and unresolved, requiring additional time to prepare expert reports.**

The Court entered a Scheduling Order [DKT #1075] on March 29, 2007. Thereafter, the Cargill Defendants moved to modify that order [DKT #1297], to which the State responded [DKT #1322] proposing certain alterations of its own to the Scheduling Order. On November 15, 2007 the Court entered an Amended Scheduling Order [DKT #1376].

On January 25, 2008 the State filed its objection [DKT #1470] to the Amended Scheduling Order, and the Court's denial of reconsideration of aspects of that order [DKT #1459], particularly involving the extent to which the April 1, 2008 expert reports need to "fully opine on all issues of causation and issues of remediation and affirmative relief" except for the

"very focused area of monetary damages" which was reserved for the second deadline. The State's objection is now before the District Court and will be, presumably, ruled upon in due course, probably after the Court rules on the preliminary injunction motion. Accordingly, at the present time the actual content of the April 1, 2008 expert disclosures is still at issue, giving further reason to extend the due date to allow the experts to know precisely what is required of them. To the extent the Magistrate Judge's order is affirmed, more time will be required to complete the more comprehensive expert reports than if the State's position is adopted by the Court.

**C. Proceedings on the preliminary injunction have distracted the State's experts from the preparation of their April 1, 2008 reports.**

Additionally, the public health interest sought to be vindicated in the State's Motion for Preliminary Injunction has interfered with the preparation of the State's expert reports. As the Court knows, the relief sought in the State's Motion for Preliminary Injunction would stop land application of poultry waste before the spring spreading season. Consequently, to be effective, that motion necessarily had to be heard shortly before the April 1 expert report deadline. The necessity of preparing for production of considered materials, preparing for and sitting for deposition, and preparing for and giving testimony, as well as assisting counsel for the State in preparation for cross examination of the Defendants' undeposed experts, has distracted the State's experts from their tasks of preparing their initial expert reports due April 1, 2008. For precisely the same reasons Defendants have argue that motion responses or Rule 30(b)(6) depositions should be deferred due to the requirements of the preliminary injunction, the State's experts have also been required to put aside their other work in large part in order to participate in activities surrounding the preliminary injunction.

**D. Defendants will not be prejudiced by an extension of the expert report date.**

By virtue of the proceedings on the preliminary injunction, Defendants have already received: (1) affidavits from many of the State's experts; (2) the materials they considered in forming their opinions on issues presented in the preliminary injunction; (3) depositions of these experts; (4) their hearing testimony; and (5) critiques of their opinions by retained defense experts. Consequently, Defendants' understanding of many aspects of the State's case has greatly expanded, all in advance of the formal expert witness reports now due on April 1, 2008. Defendants can, and have, subjected the work of these experts to critique and cross examination, and can continue to build their defense to the opinions of these experts. Defendants are, indeed, ahead of their anticipated understanding of the opinions of many of the State's experts and will not be prejudiced by a grant of additional time for the formal reports now due on April 1, 2008.

**E. The Court should extend the deadlines in the Amended Scheduling Order.**

For the Court should extend the following deadlines in the Amended Scheduling Order:

| Event                                   | Current Date  | Proposed Date    |
|---|---------------|------------------|
| Plaintiff's Expert Reports <sup>1</sup> | April 1, 2008 | August 4, 2008   |
| Defendants' Expert Reports              | July 1, 2008  | November 3, 2008 |

These dates have been subject to litigation as described herein. Granting this request for extension of time will not affect the September, 2009 trial date.

**IV. Conclusion**

In light of the foregoing, the State's motion should be granted.

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<sup>1</sup> Both State and defense reports should be extended, whether their content is as currently required on all issues except damages, or as may be modified by the District Court pursuant to the State's objection [DKT #1470].

Respectfully Submitted,

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